

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 509

UNITED STATES OF AMERICA, PETITIONER

v.

VERMONT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The State of Vermont contends that it is unfair to give the federal government the priority which results from treating the federal tax lien upon all of a taxpayer's property as perfected, but treats a similar earlier-arising State tax lien as unperfected because, when the federal lien arose, the State lien had not yet attached to specific property. But when the State's contention is evaluated in the context of the statutory provisions involved in this case, we submit that there would be no unfairness to the State in holding that because its lien does not meet the federal standard of choateness or perfection, the lien is subordinate to the federal lien.

The effectiveness of any tax lien as an aid to collection of the revenue is inextricably intertwined with the underlying tax statute itself. Although the State and federal liens in the present case are identical in the sense that each attaches to all the taxpayer's property and property rights, and each arises when the tax is assessed, the difference in the assessment and collection of the respective underlying taxes makes the effect of the two liens on the abilities of the respective sovereigns to collect their taxes far from identical. The State lien is for State income taxes which the employer had withheld from wages paid to its employees but had failed to remit to the State. This tax is payable quarterly by the employer and the payment for the third quarter of 1958, which is involved in this case, was due before the end of October of that year (32 V.S.A. Section 5762). The federal tax is the federal unemployment tax for 1958. Unlike the State tax, however, that tax is not due quarterly, but on January 31 for the entire preceding year. Internal Revenue Code of 1954, Section 3301; Treasury Regulations on Employment Tax (1954) Code, Section 31.6071(a)-1(e). Thus, when the State's lien arose on October 21, 1958, by virtue of the State's assessment and demand upon Cutting and Trimming for the quarterly portion of the State income tax which it had not yet paid, the federal tax claim for the same portion of that year had not yet arisen. Hence, even though the federal government moved promptly as soon as Cutting and Trimming's 1958 federal payroll tax had accrued—it made its

assessment on February 6, 1959, only six days after the tax was due—there was no way in which the federal government possibly could have collected its claim if the State's earlier general lien was sufficiently perfected to defeat the federal lien which arose on February 6.

On the other hand, the State had more than three months from the time it assessed its tax on October 21, 1958, to the first date on which the federal tax lien could possibly have arisen (February 1, 1959) within which it could have taken steps to perfect its lien by attaching specific property. If within this period the State had instituted its suit and attached the taxpayer's funds on deposit in the Chittenden Trust Company, it would have had a fully perfected lien which would have defeated the later arising federal lien. The State, however, waited seven months after assessing its tax before taking any steps to perfect its lien.

In these circumstances, there is no unfairness to the State in requiring that, before its general lien can prevail over the federal lien, it must take the necessary steps to perfect it—here by attaching it to specific property. The critical consideration is that to permit a State tax lien which does not meet the federal standard of choateness to defeat the federal priority would thwart "the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents" (*United States v. Security Trust & Savings Bank*, 340 U.S. 47, 51). For otherwise, as this Court pointed

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out in *United States v. New Britain*, 347 U.S. 81, 86, a State always could "affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined."¹ *New Britain* held (*ibid.*) that

¹ Similar threats to the collection of federal revenues, due to differences between State and federal assessment and collection procedures, are reflected in the taxes involved in several of the cases arising under Section 3406 of the Revised Statute, in which this Court developed the doctrine of the choate lien (see the discussion of those cases in our main brief, pp. 13-14). A dramatic example is *United States v. Texas*, 314 U.S. 480, which involved State and federal taxes upon wholesale gasoline sales. Both taxes were collected monthly, but the State tax was due on the 20th of the following month and the State lien upon all of the taxpayer's business property arose automatically on the due date; the federal tax, however, was not due until the end of the succeeding month and the federal lien did not arise until there had been an assessment. In such a situation, if the State general lien were deemed perfected when it arose on the 20th of the month, the federal lien could never be effective to aid the United States in collecting its similar taxes for the same month.

A related problem may grow out of the fact that frequently the federal tax is not assessed until a substantial time after the tax is due, and the federal lien in turn does not arise until assessment. (Under the Code, when a taxpayer institutes a proceeding in the Tax Court to review an asserted deficiency, the tax cannot be finally assessed until such proceeding is completed. Internal Revenue Code of 1954, Sections 6215(a), 7481, 7485.) Thus, in *New York v. Maclay*, 288 U.S. 290, the United States was claiming priority for corporate income taxes for 1917 and 1918; the deficiency assessments for those taxes, however, had not been made until 1923 and 1925. The State was asserting its general liens for annual corporate franchise and gross income taxes for the years 1921 to 1925; these liens, like the State gasoline tax liens in the *Texas* case, *supra*, arose automatically when the respective taxes became due on March 15 and August 15. In that situation, as in the *Texas* case, the

for this reason a State lien which had not "become certain as to amount, identity of the lienor, or the property subject thereto" when the federal lien attached could not "displace such federal liens." Since, when the federal lien in this case arose on February 6, 1959, the tax lien of the State of Vermont did not meet the requirement that "the lien must attach to specific property of the debtor" (*Illinois v. Campbell*, 329 U.S. 362, 373), the federal lien has priority.

Respectfully submitted.

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federal liens would have been ineffective to protect the federal revenue based on taxes for earlier years if the general State tax liens for subsequent years were deemed perfected when they arose.